

ARTICLE 17.1. PUBLIC RECORDS; CONFIDENTIAL INFORMATION; CONFIDENTIALITY AGREEMENTS

RULE 1. PURPOSE AND APPLICABILITY

326 IAC 17.1-1-1 --- Public records: purpose

The purpose of this article is to provide the following:

- (1) The policy of the air pollution control board, to be followed by the department, in making public records available for public review and copying in accordance with IC 5-14-3 unless the information is determined to be confidential.
- (2) The provisions for protecting legitimate interests in the confidentiality of certain information.
- (3) The criteria to be used for determining the legitimacy of confidentiality claims in accordance with IC 5-14-3.
- (4) The procedures that the commissioner shall use in making determinations on the confidentiality of information.
- (5) The form of confidentiality agreements required by IC 13-14-11-5 from employees of the department and from persons under contract to the department.

[As added at: 23 IR 1367.]

326 IAC 17.1-1-2 --- Public records: applicability

This article applies to the following:

- (1) Information received on or after the effective date of this rule from a person requesting confidential treatment of that information. The information may be either:
 - (A) treated as a single unit of information even if the information is comprised of a collection of individual items of information; or
 - (B) separated into two (2) or more categories to afford different treatment to the information in each category because the claim covers only a portion of the information.
- (2) Employees of the department and contractors who:
 - (A) make the confidentiality determination;
 - (B) handle the confidential information; or
 - (C) maintain the file of confidential information.
- (3) Public records, except for the following:
 - (A) In the event of a conflict between this article and 40 CFR 2.301* (Confidentiality of Business Information), both of which are applicable to the information or document, 40 CFR 2.301* shall govern over this article.
 - (B) In the event that two (2) or more sections contained in 40 CFR 2.301* apply to the information, the section that provides greater or wider access to the public of the information shall govern.

*Copies of the Code of Federal Regulations (CFR) and Federal Register (FR) referenced may be obtained from the Government Printing Office, Washington, D.C. 20402 and are also available for copying at the Indiana Department of Environmental Management, Office of Air Management, Indiana Government Center-North, 100 North Senate Avenue, Indianapolis, Indiana 46204.

[As added at: 23 IR 1368.]

RULE 2. DEFINITIONS**326 IAC 17.1-2-1 --- Definitions: “applicability”**

The definitions in this rule apply throughout this article.

[As added at: 23 IR 1368.]

326 IAC 17.1-2-2 --- Definitions: “available to the public”

“Available to the public” means a public record, as defined by IC 5-14-3, but excluding public records described in 326 IAC 17.1-3-1(b), that the department shall furnish to any member of the public upon request, or may otherwise make public.

[As added at: 23 IR 1368.]

326 IAC 17.1-2-3 --- Definitions: “claim of confidentiality” or “claim”

“Claim of confidentiality” or “claim” means a claim or assertion that information be treated as confidential because the information is excepted from disclosure under IC 5-14-3-4(a) or IC 5-14-3-4(b).

[As added at: 23 IR 1368.]

326 IAC 17.1-2-4 --- Definitions: “contractor”

“Contractor” means:

(1) any:

- (A) person;
- (B) association;
- (C) partnership;
- (D) corporation;
- (E) business;
- (F) educational institution;
- (G) governmental body; or
- (H) other entity;

performing work under contract as an authorized representative of the department; and

(2) includes a subcontractor of the contractor and employees or officers of the contractor and subcontractor, which have been authorized by the department through the contract to have access to confidential information.

[As added at: 23 IR 1368.]

326 IAC 17.1-2-5 --- Definitions: “department”

“Department” means the department of environmental management.

[As added at: 23 IR 1368.]

326 IAC 17.1-2-6 --- Definitions: “information”

“Information” means any of the following, regardless of physical form or characteristics, without limitation:

- (1) Written or printed material.
- (2) Data processing card decks, printouts, and tapes.
- (3) Maps.
- (4) Charts.
- (5) Paintings.
- (6) Photographs.
- (7) Drawings.

- (8) Engravings.
- (9) Sketches.
- (10) Samples.
- (11) Working notes and papers.
- (12) Reproductions of such things by any means or process.
- (13) Sound, voice, or electronic recordings in any form, in the possession of the department by which knowledge has been preserved and may be retrieved.
- (14) Any other material.

[As added at: 23 IR 1369.]

326 IAC 17.1-2-7 --- Definitions: “person”

“Person” has the meaning set forth in IC 13-11-2-158(a).

[As added at: 23 IR 1369.]

326 IAC 17.1-2-8 --- Definitions: “public record”

“Public record” has the meaning set forth in IC 5-14-3-2.

[As added at: 23 IR 1369.]

326 IAC 17.1-2-9 --- Definitions: “trade secret”

“Trade secret” has the meaning set forth in IC 24-2-3-2.

[As added at: 23 IR 1369.]

RULE 3. ACCESS TO PUBLIC RECORDS

326 IAC 17.1-3-1 --- Access to public records

(a) The provisions of IC 5-14-3 apply to all public records. All information received by the department is considered a public record.

(b) Public records are available to the public, except for any of the following public records:

- (1) Received under or supporting a claim of confidentiality.
- (2) Under review or appeal to determine if confidential under IC 5-14-3-4(a) or IC 5-14-3-4(b).
- (3) The commissioner has determined to be confidential under IC 5-14-3-4(a) or IC 5-14-3-4(b).

(c) Public records that are available to the public may be copied by the department upon payment of a fee provided for in IC 5-14-3-8. The fee shall be paid to the cashier’s office at the Indiana department of environmental management.

[As added at: 23 IR 1369.]

RULE 4. CONFIDENTIALITY CLAIMS

326 IAC 17.1-4-1 --- Confidentiality claims

(a) A person submitting information to the department for which confidential treatment is requested shall make a written claim of confidentiality under subsections (c) and (d) at the time of submittal of the information.

(b) A person may request confidential treatment of information at the time the information is acquired through the actions of the department, such as inspections. The written claim for confidential treatment may be broad, but must be sufficiently clear to allow for accurate identification of the information claimed to be confidential. The supporting information required under subsection (d) must be submitted to the commissioner within five (5) working days from the time the information claimed as confidentiality is acquired by the department.

(c) A person submitting a claim of confidentiality shall designate and segregate the information and the supporting information to which the claim applies in a manner that is sufficiently clear to allow the department to identify all confidential claim materials. One (1) of the following methods shall be used to indicate that the information and any of the supporting information under subsection (d) is claimed as confidential:

- (1) Attaching a cover sheet instructing which information is to be treated as confidential.
- (2) Marking each page or item of information as:
 - (A) confidential;
 - (B) confidential claim material;
 - (C) trade secrets; or
 - (D) confidential business information.

(3) If information is mailed or hand delivered, marking the envelope as confidential.

(d) The person submitting the claim shall provide supporting information to show that the information claimed as confidential is entitled to confidential treatment under IC 5-14-3 including the following:

- (1) State that the information is a specific type of confidential information under IC 5-14-3-4(a) and IC 13-14-11-3(a)(1) or IC 5-14-3-4(b) and IC 13-14-11-3(a)(2). If the information is confidential under IC 5-14-3-4(a)(4), the person submitting the claim shall provide a narrative statement or documents supporting the claim that the information meets the necessary elements of a trade secret, as defined at IC 24-2-3-2.
- (2) State whether the information has previously been determined to be confidential by the commissioner.
- (3) Indicate the portion of the supporting information claimed as confidential as specified in subsection (c).
- (4) Specify the period of time for which confidentiality is requested if the period is to be other than seventy-five (75) years as provided in IC 5-14-3-4(e).
- (5) Whenever the claim is based on the commissioner's discretionary power to grant confidential status to information under IC 5-14-3-4(b) and IC 13-14-11-3(a)(2), state all of the following:
 - (A) The statute, rule, permit, or other authority that requires the submission of such information.
 - (B) Facts demonstrating that the information may be treated as confidential under IC 5-14-3-4(b).

(e) The information and supporting information claimed as confidential shall be treated as confidential until the commissioner makes a determination under 326 IAC 17.1-5.

[As added at: 23 IR 1369.]

RULE 5. DETERMINATIONS ON CLAIM OF CONFIDENTIALITY

326 IAC 17.1-5-1 --- Determinations: in general

The commissioner shall make a determination on a claim of confidentiality submitted after the effective date of this article in accordance with this article. The determination shall be made in accordance with IC 5-14-3-4 and IC 13-14-11.

[As added at: 23 IR 1370.]

326 IAC 17.1-5-2 --- Determinations: request for additional supporting information

(a) The commissioner may request additional supporting information regarding a claim of confidentiality. Any additional supporting information claimed as confidential shall be

treated as confidential until the commissioner makes a determination as required by section 1 of this rule.

(b) If the commissioner intends to make a determination to deny a claim of confidentiality, the commissioner shall notify the person in writing by certified mail, with return receipt requested, stating the following:

- (1) The additional information shall be submitted in accordance with 326 IAC 17.1-4-1(c).
- (2) The person has fifteen (15) days from the date of receipt of the notice to respond.
- (3) A submission shall be completed in the time frames and by the methods specified by IC 4-21.5-3-1(f). The person shall notify the department or telephone or facsimile within the fifteen (15) day period under subdivision (2) that additional supporting information has been mailed or deposited with a private carrier.
- (4) Failure to submit any additional information within fifteen (15) days under subdivision (2), or within the time allowed under subsection (d) to provide additional information in support of the claim, will result in a determination based on the information and any supporting information already received.
- (5) Any additional supporting information claimed as confidential shall be treated as confidential until the commissioner makes a determination as required by section 1 of this rule.

(c) The commissioner shall make a determination after receipt of the additional supporting information submitted under subsection (b). The commissioner shall notify the person under subsection (b) of the intent to deny a claim of confidentiality only once before making a determination under sections [sic., section] 3 or 4 of this rule. If the person fails to submit additional supporting information in accordance with subsection (b), the commissioner will make a determination based on the information and any supporting information already received.

(d) The commissioner may approve an extension of time for submitting additional information if the person makes a request in writing within the fifteen (15) days allowed in subsection (a)(2) and (a)(3). The extension will not exceed fifteen (15) days.

[As added at: 23 IR 1370.]

326 IAC 17.1-5-3 --- Determinations: approval determination

(a) If the commissioner determines that the information shall be held confidential for the full period requested by the person who made the claim under 326 IAC 17.1-4-1(d), the commissioner shall do all of the following:

- (1) Notify the person in writing of the determination.
- (2) Maintain the information as confidential for the period requested under 326 IAC 17.1-4-1(d), unless ordered by a court of competent jurisdiction to permit access to the information for inspection and copying.

(b) If the commissioner determines that the information is confidential but the period of confidential treatment shall be shorter than that requested by the person under 326 IAC 17.1-4-1(d), the commissioner shall notify the person in writing by certified mail, with return receipt requested stating the following:

- (1) The basis for the determination.
- (2) The period of time of confidentiality, after which the information will be available to the public.
- (3) The right to appeal the commissioner's determination.
- (4) The procedure for appealing the commissioner's determination, including the time period provided by IC 4-21.5.

[As added at: 23 IR 1370.]

326 IAC 17.1-5-4 --- Determinations: denial of claim

If the commissioner determines that the information is not confidential based on 326 IAC 17.1-4, the commissioner shall notify the person who submitted the claim of such determination. The notification shall be in writing, sent certified mail, with return receipt requested, and shall state the following:

- (1) The basis for the determination.
- (2) Notice that the person may appeal the commissioner's determination.
- (3) The procedure for appealing the commissioner's determination, including the time period provided by IC 4-21.5.
- (4) Notice that if the determination is timely appealed, the information shall be treated as confidential until the petition for review is denied or the commissioner is ordered not to treat the information as confidential.
- (5) Notice that unless the person timely appeals the determination, the information shall be made available to the public.

[As added at: 23 IR 1371.]

326 IAC 17.1-5-5 --- Determinations: modification of determinations

(a) The commissioner's determination that information is confidential shall continue in effect for the period of time specified in the determination under section 3 of this rule unless the commissioner issues a revised determination stating that the determination under section 1 of this rule no longer accurately describes the information's confidentiality due to any of the following:

- (1) Change in applicable law.
- (2) Newly-discovered or changed facts.
- (3) A clearly erroneous previous determination.

(b) If the commissioner concludes that such a determination under section 1 of this rule is of questionable validity, the commissioner shall do the following:

- (1) Inform the person in writing by certified mail with return receipt requested.
- (2) Afford the person an opportunity to furnish additional information on pertinent issues on the matter in accordance with sections [sic., section] 2(b)(1) through 2(b)(5) and section 2(d) of this rule.

(c) After consideration of any information timely submitted under subsection (b)(2), the commissioner may make either of the following determinations:

- (1) The information is not confidential.
- (2) The period of entitlement to treatment as confidential information shall end at an earlier date than that determined in accordance with section 1 of this rule.

(d) After the determination provided for by subsection (c) is made, the commissioner shall notify the person in writing by certified mail with return receipt requested stating one (1) of the following:

- (1) That the claim of confidentiality has been approved as provided for in section 3 of this rule.
- (2) That the claim of confidentiality has been denied as provided for in section 4 of this rule.

[As added at: 23 IR 1371.]

RULE 6. APPEALS**326 IAC 17.1-6-1 --- Appeals: administrative appeal**

An appeal of a determination shall be:

- (1) in accordance with IC 4-21.5-3 and rules of the office of environmental adjudication; and
- (2) made by filing a written petition for review with the office of environmental adjudication in accordance with IC 4-21.5-3.

A copy of the petition shall be served on the commissioner concurrent with such filing.

[As added at: 23 IR 1371.]

326 IAC 17.1-6-1 --- Appeals: judicial review

Judicial review of a final order of the environmental law judge shall be in accordance with IC 4-21.5-5.

[As added at: 23 IR 1371.]

RULE 7. AUTHORIZED DISCLOSURE OF CONFIDENTIAL INFORMATION**326 IAC 17.1-7-1 --- Authorized disclosure: of confidential information**

Confidential information may be disclosed by the department only in accordance with IC 13-14-11-6.

[As added at: 23 IR 1371.]

RULE 8. WRONGFUL DISCLOSURE PENALTIES**326 IAC 17.1-8-1 --- Wrongful disclosure: penalties**

Penalties for wrongful disclosure of confidential information are contained in IC 5 14-3-10.

[As added at: 23 IR 1372.]

RULE 9. CONFIDENTIALITY AGREEMENTS**326 IAC 17.1-9-1 --- Confidentiality agreements: requirements**

(a) Persons employed, contracted, or subcontracted by the department, prior to accessing or being granted access to confidential information, must execute a confidentiality agreement enforceable by:

- (1) the state; and
- (2) the submitter of the information.

(b) The following is the confidentiality agreement form for state employees:

**CONFIDENTIALITY AGREEMENT
FOR STATE EMPLOYEES**

I understand that I will have access to certain confidential information submitted to the Indiana Department of Environmental Management pursuant to state or federal statute or rule. This access has been granted in accordance with my official duties as an employee of the state of Indiana.

I understand that confidential information may not be disclosed except as authorized by rules of the board as contained in 326 IAC 17.1. My obligation not to disclose such confidential information includes disclosure to any other employee, officer, or authorized representative of the state or of the United States unless such employee, officer, or authorized representative is concerned with carrying out or implementing IC 13 or when the informa-

tion is relevant in any proceeding related to enforcement.

I understand that, under Indiana statute IC 5-14-3-10, I am liable for a possible fine of up to five thousand dollars (\$5,000) or imprisonment for up to one (1) year, or both, if I knowingly or intentionally disclose confidential information to any person not authorized to receive it.

I understand that I may be subject to disciplinary action for violation of this agreement with penalties up to and including dismissal.

I understand that this agreement is enforceable by the state of Indiana and by the person who submits confidential information.

I agree that I will treat any confidential information furnished to me as confidential as established by the department.

(Signature) _____
Name (Typed) _____ Date _____

(c) The following is the confidentiality agreement form for employees or officers of contractors:

**CONFIDENTIALITY AGREEMENT
FOR CONTRACTED EMPLOYEE OR OFFICER**

I understand that as an employee or officer of _____, a contractor performing work for the Indiana Department of Environmental Management, I will have access to certain confidential information. This access has been granted to me in order that I can perform my work under the contract.

I understand that such confidential information may not be disclosed by me except as authorized by a state or federal statute or rule. My obligation not to disclose such confidential information includes disclosure to any employee of the Indiana Department of Environmental Management, any employee or officer of any contractor, or any subcontractor unless such employee or officer has executed a confidentiality agreement.

I understand that, under Indiana statute IC 5-14-3-10, I am liable for a possible fine of up to five thousand dollars (\$5,000) or imprisonment for up to one (1) year, or both, if I knowingly or intentionally disclose confidential information to any person not authorized to receive it. In addition, I understand that I may be subject to disciplinary action for violation of this agreement up to and including dismissal.

I understand that this agreement is enforceable by the state of Indiana and by the person who submits confidential information.

I agree that I will treat any confidential information furnished to me as confidential as established by the department.

(Signature) _____
Name (Typed) _____ Date _____

[As added at: 23 IR 1372.]